NO. 81-2105

Supreme Court, U.S.
FILED
JUL 20 1982
Alexander L. Stevas, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

LARRY MIZELL, Warden,
Vienna Correctional Center,

Petitioner,

vs.

GARY WELSH,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jerold S. Solovy
Laura A. Kaster
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Respondent,
Gary Welsh

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Of Counsel

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ADDITIONAL STATUTE INVOLVED	iv
RESPONDENT'S STATEMENT OF THE CASE	1
CERTIORARI SHOULD NOT BE GRANTED	4
A. THE DECISION OF THE SEVENTH CIRCUIT WAS CORRECT AND INVOLVED NO NEW ISSUE OF LAW	4
1. The Seventh Circuit Correctly Ruled That The 1962 Law Limited The Parole Board To Considering Whether The Prisoner Was Rehabilitated	5
2. The Seventh Circuit Correctly Ruled That The 1973 Law Impaired Parole Eligibility By Adding A Criterion Not Present In 1962	8
3. The Pre-Weaver Illinois Cases Do Not Support The State's Construction Of The Parole Statutes	12
B. THERE IS NO CONFLICT WITH ANY DECISIONS OF OTHER CIRCUITS	14
C. THE SEVENTH CIRCUIT DECISION CREATES NO HARDSHIP IN THE STATE OF ILLINOIS NOR ANY POTENTIAL FOR DANGER TO SOCIETY	18
CONCLUSION	19
APPENDIXES	1a et seq.

TABLE OF AUTHORITIES

	PAGE
Alvarado v. McLaughlin, 486 F.2d 541 (4th Cir. 1973), remanded for reconsideration sub nom. McLaughlin v. Priesto, 418 U.S. 903 (1974)	10
Calder v. Bull, 3 U.S. [3 Dallas] 386 (1798).	5
DePeralta v. Garrison, 575 F.2d 749 (9th Cir. 1978)	17
Dobbert v. Florida, 432 U.S. 282 (1977)	9
Farmer v. United States Parole Commission, 588 F.2d 54 (4th Cir. 1978), cert. denied, 442 U.S. 943 (1979).	14
Geraghty v. United States Parole Commission, 579 F.2d 238 (3d Cir. 1978), vacated and remanded on other grounds, 445 U.S. 388 (1980)	14
Harris v. Irving, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980)	12-13
Kring v. Missouri, 107 U.S. 221 (1882).	5,19
Lindsey v. Washington, 301 U.S. 397 (1937).	5,9,13
Marshall v. Garrison, 659 F.2d 440 (4th Cir. 1981)	7,17
People v. Harper, 27 Ill.App.3d 406, 327 N.E.2d 91 (5th Dist. 1975)	12-13
People v. Lillie, 79 Ill.App.2d 174, 223 N.E.2d 716 (5th Dist. 1967)	6,8
People v. Moore, 133 Ill.App.2d 827, 272 N.E.2d 270 (5th Dist. 1971)	6
People v. Welsh, 30 Ill.App.3d 887, 333 N.E.2d 572 (2d Dist. 1975)	1,2
Portley v. Grossman, 450 U.S. 962 (1981) remanding 605 F.2d 563 (9th Cir. 1979)	11,18
Portley v. Grossman, 444 U.S. 1311 (Rehnquist, Circuit Justice, 1980)	11
Rifai v. United States Parole Commission, 586 F.2d 695 (9th Cir. 1978)	14,17
Rodriguez v. United States Parole Commission, 594 F.2d 170 (7th Cir. 1979)	10
Ruip v. United States, 555 F.2d 1331 (6th Cir. 1971)	14,15
Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977).	16-17

PAGE

United States v. Addonizio, 442 U.S. 178 (1978) 18

United States v. Ferri, 652 F.2d 325 (3d Cir. 1981) . . . 14

United States ex rel. Overall v. Director, No. 74 C 2541 (N.D. Ill), aff'd without opinion, 513 F.2d 634 (7th Cir. 1975) 13

United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) 18

Warden v. Marrero, 417 U.S. 653 (1974). 10

Ware v. Kaufman, No. 80 C 3209 (N.D.Ill. 1981) rev'd on rehearing (March 16, 1982) 13

Warren v. United States Parole Commission, 659 F.2d 183 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 1454 (1982) 14,15-16

Weaver v. Graham, 450 U.S. 24 (1981). . . . . passim

Welsh v. Mizell, 668 F.2d 328 (7th Cir. 1982) . . . . . passim

Zeidman v. United States Parole Commission, 593 F.2d 806 (7th Cir. 1979) 14,15

STATUTES

Ill.Rev.Stat. Ch. 38, §1003-3-5(c)(2)(1973) 2,4,8-9, 11-12

Ill.Rev.Stat. Ch. 38, §806 (1962) 2,5-6,8

18 U.S.C. §4203(a)(1964) 14-15

18 U.S.C. §4201 et seq. (1976) 15

18 U.S.C. §4206 (1976) 15,16

OTHER AUTHORITIES

C. B. Sussman, The Illinois Parole and Pardon Board, Its Structures, Duties and Responsibilities, 49 Chi.B.Rec. 200 (1968) 7

T. Gregory, Parole, 35 Chi.B.Rec. 7 (1953). 7

State of Illinois, Dept. of Pub. Safety, Parole & Pardon Board, Rules and Statutes Relating To Parole and Pardons (June 1, 1962) 7

State of Illinois, Prisoner Review Board, Rules Governing Parole, 3 Ill. Admin. Reg. Issue 1 at 144-169 (1978) 11

ADDITIONAL STATUTE INVOLVED

38 Ill.Rev.Stat. §806 (1962) provides in relevant part:

> Official Statement-Filing-Transmitting to Parole and Pardon Board or the Youth Commission-Report of receipt of prisoner or ward. § 6. In all cases, whether the sentence be definite or indeterminate, the judge by or before whom any prisoner or ward is convicted or committed, and also the State's Attorney of the county in which he or she was convicted or committed shall file an official statement with the clerk of the court to be transmitted to and to thereby furnish the Parole and Pardon Board or the Youth Commission, as the case may be, an official statement of the facts and circumstances constituting the crime or offense whereof the prisoner or ward was convicted or committed, together with all other information accessible to them in regard to the career of the prisoner or ward prior to the time of the commitment for the crime or offense of which he or she was convicted or committed relative to his or her habits, associates, disposition and reputation and any other facts and circumstances which may tend to throw light upon the question as to whether such prisoner or ward is capable again of becoming a law-abiding citizen: Provided, that the official statement herein required of the judge and the State's attorney need not include therein the evidence received after conviction as an aid to the court in fixing the minimum and maximum limits or duration of imprisonment as provided in Sections 2 and 3 of this Act, nor any conclusions or findings of fact resulting from such evidence.

NO. 81-2105

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

LARRY MIZELL, Warden,
Vienna Correctional Center,

Petitioner,

vs.

GARY WELSH,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S STATEMENT OF THE CASE

In 1963, Gary Welsh was found unfit to stand trial on charges of rape and murder based upon events which took place in September, 1962. People v. Welsh, 30 Ill.App.3d 887, 887-88, 333 N.E.2d 572, 573 (2d Dist. 1975). Until 1973, he remained in state institutions. He was then found fit to stand trial. Id. His trial resulted in a conviction on the charge of murder and an acquittal of the rape charge. Id.[1/] Mr. Welsh was sentenced to 60 to 100 years at the state penitentiary. People v. Welsh, 30 Ill.App.3d at 887-88, 333 N.E.2d at 573.

1/ Respondent, by separate motion filed with this Court, has moved to strike the state's repeated prejudicial misrepresentations that he was convicted on the charge of rape. (Pet. 1, 14.)

Mr. Welsh has now served more than eighteen years of his sentence. See Id.

In 1962, when Mr. Welsh committed the offense, Illinois law required that a grant of parole turn on the "question as to whether [the] prisoner . . . is capable of again becoming a law abiding citizen," Ill.Rev.Stat. Ch. 38 §806 (1962). The focus of the law was on individual rehabilitation. In 1973, the paroling criteria were changed by the Illinois legislature and the Parole Board was required to deny parole if it determined inter alia that the release of the prisoner "would deprecate the seriousness of the offense or promote disrespect for the law . . ." Ill.Rev. Stat. Ch. 38 §1003-3-5(c)(2) (1973).

The basis for Mr. Welsh's habeas petition was his parole denial in 1979 when the Parole Board gave as its sole reason for denying parole that a grant of parole would "deprecate the seriousness of the crime and promote disrespect for the law." (R. 1 Exhibit 1.)[2/] This statement parrots the parole criterion first enacted into Illinois law in 1973. This provision was not present in the statutory law or the Parole Board Rules in 1962 when Mr. Welsh committed the offense.

The District Court's Decision

Mr. Welsh's petition for habeas corpus alleged that the denial of parole exclusively on the basis of a standard that was not in effect in 1962 violated the ex post facto clause of the United States and Illinois Constitutions. (R. 4.) The petition asserted that the 1973 statutory change made his punishment more burdensome by directing the

---

2/ The official Record is enumerated by item. Citations to the Record will therefore be to the item number and to the internal page of the item, "R. ___; ___."

Parole Board, for the first time, to deny parole on a basis other than an evaluation of the prisoner's rehabilitation and likelihood of being a law-abiding citizen. (R. 4.)

The district court dismissed Mr. Welsh's petition (R. 6), but issued a certificate of probable cause. (R. 11.) The district court's decision was based on the premise that the grant or denial of parole was a matter of clemency or grace both prior to and after 1973 and that the 1973 law did not impinge upon the Parole Board's discretion. (R. 6; 2-3.)

The Court of Appeals' Decision

Subsequent to the district court's ruling, this Court issued its decision in Weaver v. Graham, 450 U.S. 24 (1981). Weaver made it clear that ex post facto clause analysis does not turn on whether there is a "vested right" to parole. The ex post facto clause is violated when a law assigns more onerous penal consequences to an act than was imposed by law on the date of the offense. Weaver v. Graham, 450 U.S. at 30-31. The court of appeals reversed the district court decision in light of Weaver and a long line of ex post facto clause cases. Welsh v. Mizell, 668 F.2d 328 (7th Cir. 1982).

To reach its decision, the Seventh Circuit examined the law in effect in September 1962, at the time Mr. Welsh committed the crime for which he was sentenced. The statute in force at that time required the Parole Board to focus on the individual's rehabilitation, his progress toward being a non-violent, productive member of society. Welsh v. Mizell, 668 F.2d at 330.

The Seventh Circuit then compared the laws in effect in 1962 with the new Illinois Parole Law that became effective January 1, 1973, requiring denial of parole if

release of the prisoner would deprecate the seriousness of the offense or promote disrespect for the law. Ill.Rev.Stat. Ch. 38 §1003-3-5(c)(2) (1973). The statute mandated parole denial on the basis of this criterion alone, even if a prisoner were rehabilitated.

Relying on Weaver v. Graham, 450 U.S. 24 (1981), and numerous prior decisions of this Court, the Seventh Circuit concluded that Mr. Welsh had been subjected to a retrospective reduction in his eligibility for parole in contravention of the ex post facto clause. Under the old law, Mr. Welsh might have become entitled to parole by exemplary conduct. Under the new law, "no evidence of satisfactory rehabilitation can overcome finding that the nature of his crime makes him a socially undesirable candidate for parole." Welsh v. Mizell, 668 F.2d at 331. Indeed, the new provision was the exclusive basis for parole denial in Mr. Welsh's case. Id. (R. 1, Exhibit 1). The Seventh Circuit did not mandate a grant of parole for Mr. Welsh. Rather, the Seventh Circuit reversed the district court decision and the district court has since mandated a parole rehearing for Mr. Welsh on the basis of the 1962 standards. (Appendix A to this brief.) Mr. Welsh's parole rehearing pursuant to the mandate is scheduled for August of this year.

CERTIORARI SHOULD NOT BE GRANTED

A. THE DECISION OF THE SEVENTH CIRCUIT WAS CORRECT AND INVOLVED NO NEW ISSUE OF LAW.

To analyze whether a change in the parole statute impermissibly decreased Mr. Welsh's eligibility for parole in violation of the ex post facto clause of the Constitution, the Seventh Circuit was required to compare the statutory criteria that governed Parole Board decisions in 1962, when

Mr. Welsh committed the offense, with the criteria enacted in 1973, which the Prison Review Board applied to deny Mr. Welsh his parole.[3/] The Seventh Circuit properly concluded that the criteria had changed and that the standard applied to deny Mr. Welsh his parole, that his release at the time would deprecate the seriousness of the offense and promote disrespect for the law, was not a basis for parole denial in 1962. It is this conclusion about the operation of Illinois law which the State of Illinois contests. This case involves no question about the proper scope of the ex post facto clause as recently clarified in Weaver v. Graham, 450 U.S. 24 (1981).

1. The Seventh Circuit Correctly Ruled That The 1962 Law Limited The Parole Board To Considering Whether The Prisoner Was Rehabilitated.

To determine whether Illinois law has been changed retrospectively to make Mr. Welsh's punishment more burdensome, the Seventh Circuit first looked to the statute in force in 1962. Illinois Revised Statutes, Chapter 38, Section 806 (1962), provided the factors which the Parole Board was to examine. All of the factors, including the nature of the offense, were to be examined with an eye to determining whether the individual prisoner was rehabilitated and capable of rejoining society without presenting a substantial danger of recidivism. Section 806 (which the state failed to cite in its Petition) provided in relevant part:

> the judge . . . and also the States Attorney . . . shall . . . furnish the Parole and Pardon Board or the Youth Commission, as the case may be, an official statement of the facts and circumstances constituting

---

3/ The date of the commission of the crime is the starting point for ex post facto clause analysis. Weaver v. Graham, 450 U.S. 24, 30-31 (1981); Lindsey v. Washington, 301 U.S. 397, 400 (1937); Kring v. Missouri, 107 U.S. 221, 235 (1882); Calder v. Bull, 3 U.S. [3 Dallas] 386 (1798).

> the crime or offense whereof the prisoner or ward was convicted or committed, together with all other information accessible to them in regard to the career of the prisoner or ward prior to the time of the commitment . . . relative to his or her habits, associates, disposition and reputation and any other facts and circumstances which may tend to throw light upon the question as to whether such prisoner or ward is capable of again becoming a law abiding citizen . . . . (emphasis supplied.)

The Seventh Circuit also examined Illinois cases, that were decided when the 1962 statute was controlling and discussed the different roles of the sentencing judge and the Parole Board in 1962. In both People v. Lillie, 79 Ill. App.2d 174, 223 N.E.2d 716 (5th Dist. 1967), and People v. Moore, 133 Ill.App.2d 827, 272 N.E.2d 270 (5th Dist. 1971), the Illinois appellate court considered the pre-1973 law. At that time, the sentencing judge set both a minimum and a maximum sentence. The court expressly stated that the judge had the responsibility of considering general deterrence by imposing an adequate minimum sentence. Lillie, 79 Ill. App.2d at 178, 223 N.E.2d at 719; Moore, 133 Ill. App.2d at 829, 272 N.E.2d at 271. The maximum sentence was intended to be a prognostication of the outer boundary of time required to achieve rehabilitation. The Parole Board was obligated to mediate between the extremes to determine as a matter of observation and informed expertise "to what extent incarceration has achieved rehabilitation." Id. It had no jurisdiction to consider general deterrence.4/

As the Seventh Circuit noted, the focus on rehabilitation was also reflected in the regulations issued by

---

4/ The state challenges the Seventh Circuit's reliance upon these cases because they did not deal directly with questions of parole. (Pet. 17.) Lillie and Moore held minimum sentences excessive. Both cases were intimately involved with the nature of the sentencing process and clearly establish the court's understanding of the applicable law both as to the duties of the sentencing judge and the duties of the Parole Board. Petitioner has cited no contrary Illinois authority.

the Parole Board which directed the Board to deny release only "[i]f they determine that the prisoner is not a fit person to serve his sentence outside the penitentiary." State of Illinois, Dept. of Pub. Safety, Parole & Pardon Bd., Rules and Statutes Relating To Parole and Pardons, 22 (effective June 1, 1962); Welsh v. Mizell, 668 F.2d at 330. The Seventh Circuit's view of the operation of the 1962 law is also confirmed by contemporaneous authorities. T. Gregory, Parole, 35 Chi.B.Rec. 7 (1953); C. B. Sussman, The Illinois Parole and Pardon Board, Its Structures, Duties and Responsibilities, 49 Chi.B.Rec. 200 (1968).[5/]

The petitioner argues to this Court, as it argued below, that whatever the statutory boundaries for Parole Board determinations, they could not be effective because in 1962 the Parole Board gave no statement of reasons for its decisions. (Pet. 10-11.) The statutory language is clear. There were limits on the Parole Board's authority. If the Parole Board ignored clear statutory language, its construction of the law is entitled to no weight. Marshall v. Garrison, 659 F.2d 440, 444 (4th Cir. 1981).

The state, in an effort to elevate the importance of this case, seriously mischaracterizes the Seventh Circuit's holding regarding the construction of the 1962 law. The

---

5/ To support the contrary contention that pre-1973 decisions considered general deterrence, the petitioner submits to this Court materials contained in Appendix E which were not before the district court and which were rejected by the court of appeals when the petitioner attempted to file them after referring to them in oral argument. Only one of the Pardon Board Rulings appears to be based exclusively on the nature of the offense (Petition at 30a) and it was rendered on March 1, 1972, when the Illinois legislature had considered the new standards. Mr. Welsh's basis for objecting to the filing included material inaccuracies in the affidavit and the fact that inferences drawn from the documents were subject to dispute. The court of appeals specifically ruled by order dated October 28, 1981 that these materials "are not suitable for judicial notice in this appeal." The respondent has made a separate motion to strike Appendix E on this basis.

state repeatedly asserts that the decision precludes consideration of the "seriousness of the offense" (e.g., Pet. 14, 16, 21) and requires the state to release heinous criminals.[6/] This is not the case. The Welsh decision requires that the Parole Board consider, as the 1962 statute dictates, whether the prisoner has been rehabilitated and no longer presents a serious threat to society. The nature of the offense may, of course, be considered in that context. Such consideration is indeed mandated in Section 806 which requires the Parole Board to consider the prisoner's record "to throw light upon the question as to whether such prisoner . . . is capable of again becoming a law abiding citizen." See People v. Lillie, 79 Ill.App.2d at 178-79, 223 N.E.2d at 716-19. The Seventh Circuit held that for those prisoners who admitted crimes prior to 1973, the Parole Board must continue to focus on the individual prisoner's rehabilitation; the premise of the decision-making process may not be changed retrospectively to deny parole on the basis of societal concern about general deterrence.

2. The Seventh Circuit Correctly Ruled That The 1973 Law Impaired Parole Eligibility By Adding A Criterion Not Present in 1962.

The Seventh Circuit compared the 1962 statutory standards to those enacted in 1973 (Ill.Rev.Stat. Ch. 38 §1003-3-5(c)) which specifically state, inter alia, that "the Board shall not parole a prisoner eligible for parole if it determines that: . . . (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law. . . ." (Emphasis supplied.) It was

---

6/ The amicus also refers to its concern that the "seriousness of the offense" may not be considered under the Seventh Circuit's decision. (Amicus Brief at 2.)

this criterion, not present in the 1962 law, which was the sole reason given for Mr. Welsh's parole denial.

The petitioner erroneously asserts that the issue the Seventh Circuit considered was whether the 1973 law for the first time permitted the Parole Board to consider the "seriousness of the offense." (Pet. 14-16.) By omitting the word "deprecate," which is present in the statute, the state confuses the Seventh Circuit's holding. What the Seventh Circuit in fact held was that the new criterion requiring parole denial if the Board found release would "deprecate the seriousness of the offense" created new authority for the Parole Board. The 1973 Act requires the Parole Board to consider the impact of release on the public at large. Under the new criterion in the 1973 statute, the offense itself may automatically disqualify the prisoner for release until a fixed period of time has been served. Denial of parole may occur even if the prisoner is rehabilitated and therefore would have been paroled under the 1962 Act.7/

Although the state can alter its penological philosophy prospectively, a retrospective change in the law is prohibited. The state may reject the rehabilitation model which was the underlying premise of the 1962 law. But, the state may not apply altered rules retrospectively consistent with the ex post facto clause's prohibition. This is the essence of the Seventh Circuit's ruling.

7/ The amicus argues that Mr. Welsh might have been denied parole under the 1962 standards (Amicus Brief at 3). This Court has repeatedly held, however, that the issue is whether there has been an increase in the possible penalty "regardless of the length of the sentence actually imposed." Lindsey v. Washington, 301 U.S. 397, 401 (1937). The ex post facto clause prohibits laws which potentially--as well as actually--make punishment more onerous. Dobbert v. Florida, 432 U.S. 282, 300 (1977).

The Seventh Circuit's ruling is fully consistent with prior decisions of this Court which recognized that a reduction in opportunity for early release would disadvantage the prisoner. For example, in Warden v. Marrero, 417 U.S. 653, 662-63 (1974), this Court recognized that a repealer of parole eligibility previously available to imprisoned offenders would clearly present a serious question under the ex post facto clause.[8/]

Indeed, in Weaver v. Graham, 450 U.S. 24 (1981), this Court examined the change of rules governing gain-time in terms of an "opportunity to shorten his time in prison simply through good conduct." Id. at 34. Weaver established that whether the grant or denial of early release is a matter of grace or a "vested right" has no bearing on ex post facto clause analysis. A reduction in the opportunity for release imposed after the commission of a crime is constitutionally impermissible. It was Mr. Welsh's opportunity to be released on parole purely on the basis of his good conduct and rehabilitation which was jeopardized by the 1973 law.

In Weaver, 450 U.S. at 32, this Court also cited with approval Rodriguez v. United States Parole Commission, 594 F.2d 170 (7th Cir. 1979), in which the circuit court ruled a change in the timing of parole hearings so impaired parole eligibility as to constitute an ex post facto violation, and stated: "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the

---

8/ In its amicus brief the state of New Mexico argues that changes in parole criteria are merely procedural, because parole changes only the location of the service of a prison sentence (Amicus Brief at 3), citing Alvarado v. McLaughlin, 486 F.2d 541 (4th Cir. 1973). Warden v. Marrero refutes this contention and, indeed, Alvarado was remanded for reconsideration in light of Marrero in McLaughlin v. Priesto, 418 U.S. 903 (1974).

defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." Weaver v. Graham, 450 U.S. at 32.

The amicus cites Portley v. Grossman, 444 U.S. 1311 (1980), as upholding a change in parole decision making factors. (Amicus Brief at 2.) But Portley was not a decision of this court. It was a decision of Justice Rehnquist, acting as Circuit Justice, denying a stay of the Ninth Circuit's mandate in the case. The underlying decision was subsequently vacated by this Court and remanded for reconsideration in light of Weaver. Portley v. Grossman, 450 U.S. 962 (1981), remanding Portley v. Grossman, 605 F.2d 563 (9th Cir. 1979).

To add a second string to his bow, petitioner argues, for the first time, that the 1973 law does not prohibit the Parole Board from granting parole even if it finds that release would deprecate the seriousness of the offense. (Petition at 17.)[9/] The petitioner cites no case authority for this proposition. The statutory language is straightforward and refutes this assertion. The statute states the "Board shall not parole a person eligible for parole if it determines that . . . (2) his release at that

---

9/ The Prisoner Review Board Rules upon which petitioner relies for this proposition (Pet. 17) do not support petitioner's contention that the rules create a balancing standard. The rules state "the parole board shall not parole a candidate if it determines that" - and then lists several criteria. "B" states "Release of the candidate would deprecate seriousness of the offense or promote disrespect for the law based on one or more of the following factors: 1. The offense is one of murder, attempted murder or killing of an individual, robbery with a weapon, rape, indecent liberties, deviate sexual assault, aggravated kidnapping or kidnapping for ransom, armed violence, treason, aggravated arson, treason or calculated criminal drug conspiracy. 2. The aggravating as well as mitigating circumstances as described in Chapter 38, Sections 1005-5-3.1 and 1005-5-3.2, Illinois Revised Statutes." State of Illinois, Prisoner Review Board, Rules Governing Parole, Rule V B, 3 Ill. Admin. Reg. Issue 1 at 154 (1979).

time would deprecate the seriousness of his offense or promote disrespect for the law." (Emphasis supplied.) Ill. Rev. Stat. ch. 38 § 1003-3-5(c)(2) (1973).

The petitioner's argument that there was unlimited discretion in the Parole Board both before and after 1973 is not supported by the statutes involved. The statutes, both in 1962 and 1973, set standards for parole decision making. The standards are different and the 1973 standards make parole more difficult to obtain. The petitioner's argument is, therefore, in many ways a disguised reargument that parole is not a vested right but a matter of clemency and grace. This Court has established beyond dispute that a change in standards that narrows the discretion of the decision-making authority and thereby reduces a prisoner's opportunity for parole cannot be ignored simply because there is no entitlement to parole. Weaver v. Graham, 450 U.S. at 29-30 (1981).

3. The Pre-Weaver Illinois Cases Do Not Support The State's Construction Of The Parole Statutes.

The petitioner contends that Illinois case law establishes that general deterrence was a factor considered in the granting of parole in 1962. Petitioner cites two Illinois appellate court cases, both of which were rejected as erroneously decided by the Seventh Circuit, Harris v. Irving, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980); and People v. Harper, 27 Ill.App.3d 406, 327 N.E.2d 91 (5th Dist. 1975). Neither case states that general deterrence was a factor considered in reaching parole decisions in 1962.

Harris and Harper were both decided prior to Weaver v. Graham. They involved challenges to the 1973 parole statute. Both held the ex post facto clause was not

violated by the change in Illinois law. The decision in Harris was premised upon the rationale that parole was not a vested right. Weaver is clear in establishing that this analysis may not be applied to cases involving ex post facto clause challenges. 450 U.S. 24, 29-30 (1981). Harper, an earlier decision by the same court, was published as a one paragraph abstract opinion which contained no analysis of the change in the law and can be presumed to suffer from the same analytical fault as the court's later decision in Harris.[10/]

Moreover, the Seventh Circuit was required to make its own analysis of the statutory changes. This Court has made it clear that both the decision whether the standards of punishment set up before and after the offense differ and the decision whether the change violates the federal Constitution's ban against imposition of ex post facto laws are matters for resolution by the federal courts. Lindsey v. Washington, 301 U.S. 397, 400 (1937).

In Weaver v. Graham, 450 U.S. at 33, this Court reiterated the rule that "[w]hether a restrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question." (Citing Lindsey with approval.) Indeed, in both Lindsey and Weaver v. Graham, this Court rejected interpretations by the Supreme Courts of the states of Washington and Florida, respectively. Both courts had held that statutes retrospectively affecting prison terms were no more onerous than their predecessors.

10/ The petitioner also cites two federal court decisions from the Northern District of Illinois. United States ex rel. Overall v. Director, (unpublished opinion), No. 74 C 2541 (N.D.Ill.), aff'd without opinion, 513 F.2d 634 (7th Cir. 1975), was decided prior to Weaver v. Graham; Ware v. Kaufman, (unpublished opinion), No. 80 C 3209 (N.D.Ill. 1981), was reversed on rehearing after the Seventh Circuit rendered its decision in this case. Ware v. Kaufman, No. 80 C 3209 (March 16, 1982) (See Memorandum opinion dated June 3, 1982, Appendix B to this brief).

The state's bald assertion that the Seventh Circuit has usurped the state's authority under the Tenth Amendment to the United States Constitution (Petition at 14, 19, 25, 29-31), or otherwise, is without legal support.

B. THERE IS NO CONFLICT WITH ANY DECISION OF OTHER CIRCUITS.

The petitioner asserts that the decision in this case is in conflict with the District of Columbia circuit court decision in Warren v. United States Parole Commission, 659 F.2d 183 (1981), cert. denied, 102 S.Ct. 1454 (1982). (Petition at 26-29). There is no such conflict. Warren, and several cases from other circuits, including the Seventh Circuit, have addressed the question of whether retrospective application of changed federal adult parole laws violated the ex post facto clause.[11/] Two federal adult parole statutes entirely different from the Illinois laws were examined to reach the conclusion in these cases that there was no ex post facto clause violation.[12/] The decisions that pertain to the federal adult parole law changes are inapposite.

Prior to 1973, the United States Parole Board operated pursuant to the statutory mandate contained in 18 U.S.C. §4203(a) (1964), which provided in relevant part that if the Parole Board determines:

11/ Rifai v. United States Parole Comm'n, 586 F.2d 695 (9th Cir. 1978); Ruip v. United States, 555 F.2d 1331 (6th Cir. 1971); Zeidman v. United States Parole Comm'n, 593 F.2d 806 (7th Cir. 1979); Farmer v. United States Parole Comm'n, 558 F.2d 54 (4th Cir. 1978), cert. denied, 442 U.S. 943 (1979).

12/ But see Geraghty v. United States Parole Comm'n, 579 F.2d 238 (3d Cir. 1978), vacated and remanded on other grounds, 445 U.S. 388 (1980). (The court held that mechanical application of 1973 federal parole guidelines to bar parole before a specified period and to deny individual treatment was a violation of the ex post facto clause. See discussion of Geraghty in United States v. Ferri, 652 F.2d 325, 327-28 (3d Cir. 1981).)

> a prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole. (Emphasis supplied.)

In 1973, the Parole Board promulgated guidelines for parole release. The guidelines grouped offenses by category of severity and provided for assigning a salient factor score to each prisoner. The salient factor score was based on the individual prisoner's history and predictions about recidivism. A table combined the salient factor score and the offense severity factor to yield a suggested range of time to be served prior to release or parole.

In 1976, Congress passed the Parole Commission Reorganization Act of 1976. Pub. L. No. 94-233, 90 Stat. 219 (codified at 18 U.S.C. §4201 et seq. (1976)). It replaced the old parole eligibility statute, §4203 (quoted above), with 18 U.S.C. §4206 (1976). The new law included a criterion:

> "(a) (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law"

However, subsection (c) of §4206 specifically provides that the "Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing."

In Warren v. United States Parole Commission, 659 F.2d 183 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 1454 (1982), the court of appeals ruled that the 1976 federal law did not run afoul of the ex post facto clause as applied to Warren.[13/] Warren had committed two crimes while on parole

---

13/ Other federal cases have rejected challenges to the federal guidelines because they are not "laws" within the meaning of the ex post facto clause. E.g., Zeidman v. United States Parole Comm'n, 593 F.2d 806, 808 (7th Cir. 1979); Ruip v. United States, 555 F.2d 1331, 1335-36 (6th Cir. 1977).

release. He was contesting application of the guidelines to consideration of reparole.

The Warren court specifically noted that the new federal statute grants the Commission power to ignore the statutory guidelines for good cause. The old statute similarly placed no express or implied limits on the Parole Board's discretion.

The Illinois statutes both old and new are significantly different from the parole statutes at issue in Warren. The Illinois 1962 criteria were to be used to determine whether the prisoner would remain non-violent and was rehabilitated. The Illinois 1962 statute and regulations required release if the enumerated criteria were met. (See discussion supra at pp. 5-8.) The early federal statute said if criteria are met the Board "may in its discretion" grant parole.

In direct opposition to the Illinois 1962 law, the 1973 Illinois statute requires denial of parole for the enumerated reasons. It does not leave the Parole Board any discretion. (See discussion supra at pp. 8-12.) The new 1976 federal statute provides for a grant or denial of parole, notwithstanding the guidelines, for good cause. 18 U.S.C. §4206(c)(1976).

Indeed, if the Illinois statutes at issue here are to be compared with other statutes, federal statutes with greater similarity to Illinois' are at hand. The 1962 Illinois statute involved in this case more closely parallels the statute considered in Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977). Shepard committed a crime in 1972. The Second Circuit held the parole commission could not apply 1976 parole laws to this Youth Corrections Act prisoner. The Youth Corrections Act listed several criteria which were

to be considered in determining whether to grant parole. The court found a focus on general deterrence conspicuously absent from the enumerated criteria. Shepard 556 F.2d at 653. In referring to the old statute, the court stated:

> This, of course, did not eliminate the important concern to protect the public from the rampages of youthful criminals. It did mean, however, that the decision to release a young offender had to be based on whether he would err again (specific deterrence of the sentenced individual) rather than on whether others would be more prone to commit antisocial acts if the youth were released before the expiration of his maximum term (general deterrence) or whether society had accorded the youth his "just desserts." (retribution). 556 F.2d at 653. (Citations omitted.) (Emphasis in original.)

The only circuit courts which have considered the ex post facto clause challenge to the change in standards applicable to parole for those sentenced under the Youth Corrections Act have accepted the Shepard analysis.[14/] The agreement of the courts is based on their unanimous opinion that the question of whether the changes impose an unlawful retrospective burden requires close individualized analysis of the particular statutes at issue. In fact, in Rifai v. United States Parole Commission, 586 F.2d 695, 699 (9th Cir. 1978), which upheld the federal adult parole statute against an ex post facto challenge, the court acknowledged the propriety of the decision in Shepard, but found it distinguishable. The ex post facto clause analysis must be made by examining the specific statutes and the effect changes contained in them have on eligibility for parole.[15/] This case does not and cannot create a conflict in the circuits.

14/ Marshall v. Garrison, 659 F.2d 440 (4th Cir. 1981); DePeralta v. Garrison, 575 F.2d 749 (9th Cir. 1978).

15/ For this reason, the Amicus' argument that New Mexico is directly affected by the Seventh Circuit's decision is erroneous. The change in the terms of the New Mexico statute must be separately examined to determine whether they violate the ex post facto clause. The Amicus does not cite to the statutory changes which are involved.

Moreover, this Court has twice deferred consideration of the question whether the retrospective application of the new federal adult parole law violates the ex post facto clause. United States v. Addonizio, 442 U.S. 178, 184 (1978); United States Parole Commission v. Geraghty, 445 U.S. 388, 390 n. 1 (1980). In addition, this Court remanded Portley v. Grossman, 450 U.S. 962 (1981), which also raised this issue, for further consideration in light of Weaver v. Graham, 450 U.S. 24 (1981). The Court has, therefore, recently indicated its preference for allowing the circuit courts to further develop the law in this area. This case, which revolves around two entirely different Illinois statutory provisions, does not present the proper vehicle for an evaluation of the constitutionality of the federal adult parole law.

C. THE SEVENTH CIRCUIT DECISION CREATES NO HARDSHIP ON THE STATE OF ILLINOIS NOR ANY POTENTIAL FOR DANGER TO SOCIETY.

The decision of the Seventh Circuit in this case does not require release of Mr. Welsh or of any other prisoner, as suggested throughout the Petition. It requires an application of parole guidelines in effect from 1962 to 1973 for those persons who committed crimes during that period. The parole rehearings can, in compliance with the Welsh decision, consider the prisoner's record, including the seriousness of the offense, in the context of determining whether the prisoner is rehabilitated and no longer a danger to society if released. The prisoners who are affected by the Welsh decision are all prisoners who by statute are eligible for parole. There is and can be no parade of horribles. The burden upon the state in holding parole hearings under standards it previously applied is insignificant in light of the Constitutional violation. "So much importance did the [C]onvention attach to [the ex post facto

prohibition], that it is found twice in the Constitution." (U.S. Const. Act I, §9, Cl. 3; Art. I, §10, Cl. 1.) Kring v. Missouri, 107 U.S. 221, 227 (1883) (quoted in Weaver v. Graham, 450 U.S. 24, 28 n. 8).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

Jerold S. Solovy
Laura A. Kaster
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Respondent, Gary Welsh

Jenner & Block
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Of Counsel

Dated: July 14, 1982

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

DOCUMENT NUMBER_____
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
MAY - 4 1982

GARY WELSH,

Petitioner,

-vs-

LARRY MIZELL, Warden, Vienna Correctional Center, Vienna, Illinois, and TYRONE FAHNER, Attorney General of the State of Illinois,

Respondents.

No. 80 4104

ORDER

Pursuant to the mandate of the United States Court of Appeals for the Seventh Circuit, which was issued to this Court on April 9, 1982, in the case of Welsh v. Mizell, No. 80-1862, and in which the Seventh Circuit on January 12, 1982, ruled (1) that Mr. Welsh's constitutional right to be free from ex post facto laws was being violated by the way that the Illinois Prison Review Board was denying him parole and (2) that the proper remedy was to remand the case to the Illinois Prison Review Board for reconsideration of his parole under the relevant and constitutionally proper standards

IT IS HEREBY ORDERED that this case is remanded to the Illinois Prison Review Board for prompt reconsideration of Mr. Welsh's parole application under the statutes and regulations in effect in 1962, the year that Mr. Welsh committed the offense for which he is incarcerated; and

IT IS FURTHER ORDERED that the Prison Review Board at that prompt rehearing apply the standard in effect in 1962 as articulated in Sections 6 and 7b of the Parole Law and the underlying regulations (Ill. Rev. Stat. Ch. 38, Sec. 806, 808a (1961); Cf. Ill. Rev. Stat. Ch. 127, Sec. 55b (1961) and determine whether Mr. Welsh's conduct and other allowable criteria have demonstrated his rehabilitation and his ability again to become a law-abiding citizen. Welsh v. Mizell, 668 F.2d 328, 330 (7th Cir. 1982).

DATED: This 4th day of April, A.D. 1982.

W. J. Beatty

UNITED STATES DISTRICT JUDGE

NOTE: CLERK TO SEND COPIES TO ALL PARTIES.

mod 5-4-82

APPENDIX B

OFFICE COPY

FILED
MAR 16 1982
STUART CUNNINGHAM, U. S. DISTRICT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRANK WARE and
ELIZABETH WARE,

Plaintiffs,

v.

No. 80 C 3209

K.V.KAUFMAN, IRVING R. JAMES
and GAYLE FRANZEN,

Defendants.

MEMORANDUM OPINION

On October 13, 1981, in granting the defendants' motion to dismiss the plaintiffs' section 1983 complaint, we held, inter alia, that the retrospective application of Ill.Rev.Stat., ch.38, §1003-3-5(c)(2) to deny to the plaintiffs parole on the basis of the seriousness of their offenses did not violate the ex post facto clause. The plaintiffs filed a motion to reconsider.

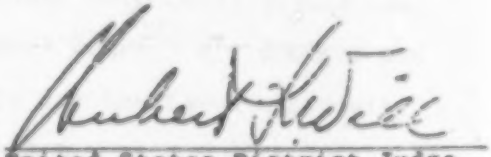
Subsequent to our initial decision, the Seventh Circuit held that retrospective application of the general deterrence criteria in section 1003-3-5(c)(2) does violate the constitution. Welsh v. Mizell, 80-1852 (Jan. 12, 1982). We therefore vacate that portion of our opinion and judgment in this case which dealt with the application of section 1003-3-5(c)(2)

to deny parole to the plaintiffs. We also grant a declaratory judgment that the plaintiffs' constitutional rights were violated when parole was denied on the basis of the seriousness of their offenses and that they are entitled to new parole hearings within a short period of time at which the defendants will apply the statute and regulations that were in effect in 1969 when the plaintiffs committed their crimes, not the statute and regulations subsequently enacted.

The plaintiffs also ask for damages for that violation of their constitutional rights. The defendants, however, are entitled to a good faith defense in an action for damages under section 1983. In denying the plaintiffs parole on the basis of section 1003-3-5(c)(2), the defendants were simply applying a statute passed by the legislature and following the normal procedure of the Illinois Prisoner Review Board. Moreover, the reasonableness of the defendants' belief that their actions were constitutional is indicated by our initial decision upholding their actions and the initial decision of the district court in Welsh v. Mizell which the court of appeals subsequently reversed. At the time the defendants' denied parole to the plaintiffs, there was no decision that application of section 1003-3-5(c)(2) to prisoners convicted before its enactment violated the ex post facto clause, and the defendants are not responsible for reasonably failing to anticipate the decision in Welsh v. Mizell. That subsequent decision does not operate

retroactively to render the defendants' actions in bad faith. As a matter of law, therefore, the plaintiffs are not entitled to recover damages.

For the reasons stated above, we grant in part the plaintiffs' motion to reconsider and vacate our opinion of October 13, 1981, insofar as it dismisses the plaintiffs' claim relating to the retrospective application of section 1003-3-5(c)(2). We also enter a declaratory judgment that the decisions to deny parole to the plaintiffs based on the seriousness of their offenses violated the ex post facto clause and that the plaintiffs are entitled within a short period of time to a new parole hearing and decision in accordance with the Seventh Circuit's decision in Welsh v. Mizell. The plaintiffs' claim for damages, however, is denied. An appropriate order will enter.



United States District Judge

DATED: MAR 1 0 1982

Supreme Court, U.S.
FILED
JUL 20 1982
Alexander L. Stevas, Clerk

NO. 81-2105

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

LARRY MIZELL, Warden, Vienna Correctional Center,

Petitioner,

vs.

GARY WELSH,

Respondent.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Respondent, Gary Welsh, by his attorneys, JENNER & BLOCK, hereby moves for leave to file the accompanying Brief in Opposition to Certiorari pursuant to Rule 46 and to proceed in forma pauperis.

In support of this Motion, Respondent states that he proceeded pro se in the district court. His counsel was appointed by the Court of Appeals for the Seventh Circuit purusant to the Criminal Justice Act. 18 U.S.C. §3006(A). The necessary costs already having been paid, a motion to proceed in forma pauperis was denied. The Respondent cannot afford the costs of the printing or reproduction of this brief and respectfully requests that the Court grant this motion. No affidavit in support of this motion is required pursuant to 18 U.S.C. §3006(A)(D) and Supreme Court Rule 46.1.

GARY WELSH, Respondent

By Laura A. Kaster
One of his Attorneys

Jerold S. Solovy
Laura A. Kaster
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350